Supreme Court, U.S.
FILED
NOV 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

October Term, 1978

No. 78-573

CHARLES E. MELTON,

Petitioner,

v.

MICHAEL L. BOW,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Dennis T. Cathey
Attorney at Law

Edward E. Strain, III
Attorney at Law

Counsel for Respondent

Cathey & Strain
P.O. Box 689
Cornelia, Georgia 30531

October, 1978

INDEX

Page

STATEMENT OF THE CASE 1

REASONS THE WRIT SHOULD BE DENIED 2

I. NO CONCLUSIVE PRESUMPTION WAS CREATED BY THE GEORGIA SUPREME COURT 2

II. PETITIONER HAS WAIVED HIS RIGHT TO ASSERT A VIOLATION OF HIS CONSTITUTIONAL RIGHTS 3

III. THE GEORGIA LAW OF INFERRRED DAMAGES DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS 5

IV. RESPONDENT SHOWED COMPETENT EVIDENCE OF DAMAGE TO HIS REPUTATION AND FAULT BY THE PETITIONER IN MAKING THE DEFAMATORY STATEMENTS 7

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

Cases: **Page**

City of Atlanta v. Columbia Pictures Co., 218 Ga. 714 (1963) 4

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 8

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 8

Harrington v. City of Atlanta, 224 Ga. 465 (1968) 4

Melton v. Bow, 241 Ga. 629 (1978) 3

New York Times v. Sullivan, 376 U.S. 254 (1964) 8

Time Inc., v. Firestone, 424 U.S. 448 (1976) 8

Van Gundy v. Wilson, 84 Ga. App. 429 (1951) 7

Statues:

Georgia Code § 26-2313 2

Georgia Code § 105-702 4

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-573

CHARLES E. MELTON,

Petitioner,

v.

MICHAEL L. BOW,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OF THE CASE

Respondent, Michael L. Bow, filed an action for libel and slander in the Superior Court of Madison County, Georgia, against Charles E. Melton, who was Head of the Chemistry Department at the University of Georgia. At trial the evidence revealed severe damage to the reputation of Respondent and actual malice on the part of Petitioner. Fourteen defamatory utterances, eight written and six oral, were published more than 250 times. Petitioner, by letters and oral statements, falsely informed the President of the University of Georgia, the Dean of the Law School, the Chief of the University Police and numerous other persons both within and without the University community that Respondent was a liar, a thief, in trouble with the In-

ternal Revenue Service, embezzling University funds, stealing hotplates and chemicals from the Chemistry Department and numerous other totally unfounded charges. (R. 13-14, 18-19, 21-23, 32-33, 35-41, 68-69, 76-78, 109, 149-159, 169, 186, 220-222, 235, 246, 255, 274, 279-281, 284, 285, 364-377; Pl. Ex. 3-15.) Petitioner had no basis whatever for the defamatory attacks. One week prior to trial Petitioner twice violated a Georgia criminal statute by threatening witnesses in an attempt to prevent them from testifying against him. Ga. Code § 26-2313. (R. 222-223, 230, 236.)

At trial no witnesses were presented by the Petitioner other than the Petitioner himself. Consequently no attempt was made by Petitioner to rebut the overwhelming evidence of injury to Respondent's reputation.

The jury returned a verdict in favor of Respondent in the amount of $200,000 which represented compensation for Respondent's damaged reputation and punitive damages. No constitutional issues were raised by Petitioner at the trial of the case nor on appeal to the Georgia Court of Appeals. It was not until after the Supreme Court of Georgia rendered its decision that Petitioner raised constitutional issues for the first time by a Motion for Rehearing. (Brief of Petitioner, Appendix B.)

REASONS THE WRIT SHOULD BE DENIED

I. NO CONCLUSIVE PRESUMPTION WAS CREATED BY THE GEORGIA SUPREME COURT.

Petitioner presents two questions for review by this Court, both of which assign constitutional error by the Georgia Supreme Court in creating a "conclusive presumption of injury to the reputation of a plaintiff in a

defamation per se case." (Brief of Petitioner, 2.) In all fairness to Petitioner the initial decision by the Georgia Supreme Court did state that the law "conclusively presumes" injury to the reputation of Respondent. (Brief of Petitioner, Appendix A.) However, after the initial decision by the Georgia Supreme Court, Petitioner filed a Motion for Rehearing complaining of the conclusive presumption and the Georgia Supreme Court thereupon changed its initial decision and removed the words "conclusively presumes." On the question of the injury to Respondent's reputation the final decision by the Georgia Supreme Court in pertinent part reads as follows:

> "Bow had no burden to prove that his reputation had been damaged by the statements imputing a crime to him. The law infers injury to his reputation." *Melton v. Bow,* 241 Ga. 629, 631 (1978).

Although Petitioner quotes the initial decision containing the phrase "conclusively presumes" at three places in his brief these words do not appear in the final opinion by the Georgia Supreme Court. Petitioner's assignments of constitutional error are based upon language which in fact does not appear in the decision by the Georgia Supreme Court because of the removal of that language upon motion of Petitioner.

II. PETITIONER HAS WAVIED HIS RIGHT TO ASSERT A VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Disregarding Petitioner's attempt to read the words "conclusively presumes" into the decision by the Georgia Supreme Court Petitioner claims his rights to due process and equal protection under the Fourteenth Amendment were violated by the opinion of the Georgia Supreme

Court. This violation occurred, according to Petitioner, because the Georgia Supreme Court's holding that the "law infers injury to his reputation" is tantamount to a holding that the law "conclusively presumes" injury to reputation. The ruling by the Georgia Supreme Court, upon which Petitioner's entire argument to this Court is based, merely paraphrases the Georgia defamation statue which holds that where one imputes to another a crime punishable by law "damage is inferred." Ga. Code § 105-702. The statue, as paraphrased by the Georgia Supreme Court, was the law in the State of Georgia at the time of trial and could have been attacked as unconstitutional at that time. However, Petitioner failed to challenge the law of inferred damages at trial. In Georgia as well as in the federal system a constutitional challenge must be made at trial or it is waived. *City of Atlanta v. Columbia Pictures Co.,* 218 Ga. 714, 719 (1963); *Harrington v. City of Atlanta,* 224 Ga. 465 (1968).

Furthermore, Georgia Code Section 105-702 containing the very language Petitioner says is unconstitutional was given in charge to the jury by the trial judge without objection by Petitioner. (R. 353.) There is nothing in Petitioner's argument to this Court and nothing in the record in this case which indicates any excuse, reason or exception for Petitioner's failure to make the constitutional challenge in the trial court. By his own conduct Petitioner has effectively prevented the Georgia Supreme Court from ruling upon a constitutional challenge to the law of inferred damages in the State of Georgia. Petitioner has waived his right to assert constitutional issues in this Court.

Appellate review of the $200,000 damage award is further complicated because the verdict form did not

delineate between general and punitive damages. Although the trial court initially proposed a two-part verdict form which would have separated the general damages from the punitive damages, Petitioner objected to such a verdict form. After objection counsel for both parties stipulated to the use of a verdict form which allowed only one lump sum award. (R. 359; R. 56-57.) The Petitioner again in this instance sealed himself off from effective appellate review of the damage award by his conduct at trial.

III. THE GEORGIA LAW OF INFERRED DAMAGES DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

At trial Respondent showed his reputation had been damaged by introducing into evidence defamatory statements made about him by the Petitioner. None of the statements were true. These statements, in which Respondent was accused by Petitioner of being a liar, a thief, an embezzler of University funds, a stealer of hotplates and chemicals from the Chemistry Department, were made to officials at the University of Georgia and also to mere employees. The jury was allowed to infer from the nature of these statements, the people to whom they were made, and the circumstances under which they were made, that the Respondent's reputation had in fact been damaged. No evidence was introduced by Petitioner to rebut Respondent's evidence of a damaged reputation. Petitioner maintained the defamatory statements were true and secondly, that they were made in the course of a good faith investigation of wrongdoing at the University and thus priviliged. (R. 177-178, 200.) The jury chose not to believe Petitioner.

Petitioner now complains that it was unconstitutional to allow the jury to infer damages from these statements because a conclusive presumption of injury was created which could not be rebutted by Petitioner. Yet Petitioner made no attempt at trial to rebut the injury to Respondent's reputation. There is nothing in Georgia law that would have prevented Petitioner from calling witnesses to testify that Respondent's reputation had not been damaged by the defamatory statements. Petitioner states that, "the Georgia Supreme Court provides no opportunity for a Defendant in a defamation per se case to demonstrate the absence of actual injury to a Plaintiff's reputation and effectively forecloses the individual judicial determination of that issue. . .". (Brief of Petitioner, 7.) This is an incorrect statement of Georgia law. Nothing in Georgia law nor the Georgia Supreme Court's decision prevents a defamation defendant from presenting evidence that the plaintiff's reputation was undamaged by the defamatory statements. Petitioner simply chose not to avail himself of that avenue of defense and he is now arguing that he was somehow prevented from doing so. The short answer to this is that Petitioner never attempted to rebut or in any way disprove the evidence of the injury to Respondent's reputation.

Moreover, Petitioner is again faced with the fact that the law of inferred damages was given in charge to the jury without objection. Petitioner cannot now claim that the law of inferred damages violates his Fourteenth Amendment rights when he acquiesced in that very law being charged to the jury.

IV. RESPONDENT SHOWED COMPETENT EVIDENCE OF DAMAGE TO HIS REPUTATION AND FAULT BY THE PETITIONER IN MAKING THE DEFAMATORY STATEMENTS.

One of the defenses asserted by Petitioner at trial was that he was protected by the defense of privilege because the defamatory statements were made in the course of an official investigation by him on behalf of the University of Georgia. (R. 354.) Because Petitioner asserted the defense of privilege Respondent was required under Georgia law to show that the defamatory statements were made with actual malice. *Van Gundy v. Wilson,* 84 Ga. App. 429 (1951). The element of actual malice was shown in numerous instances. Petitioners continued to make defamatory attacks upon Respondent at a time when Petitioner had been informed by the University Police and had every reason to believe that Respondent was guilty of no wrongdoing. (R. 29, 35-41, 45, 367.) Petitioner defamed Respondent to numerous persons who were in no way connected to any official investigation. (R. 109, 246, 274, 284, 376, 377, 285.) Petitioner continued to accuse Respondent of stealing chemicals at a time when Petitioner had no reason to believe chemicals were even missing from the Chemistry Department (R. 219.) And finally, if there was any doubt about Petitioner's actual malice, he threatened two witnesses one week prior to trial in an attempt to prevent them from testifying against him. (R. 222, 223, 230, 236.)

The trial burden which Respondent had and met in this case was strikingly similar to the burden this Court places upon a public official or a public figure who brings a

defamation action against a defendant in the publishing business. *New York Times v. Sullivan,* 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967). In those cases this Court held that recovery may be had only if the plaintiff proves that the false statement was made "with actual malice — that is, with the knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan, supra,* 279-280. Once the defense of privilege was asserted by Petitioner in the case at bar Georgia law required Respondent to prove actual malice in order to recover. Because *New York Times v. Sullivan* and *Curtis Publishing Co. v. Butts* involved First Amendment rights of a publishing defendant Respondent does not believe that either of these cases apply here; but nevertheless, the requisite finding of actual malice was made by the jury in this case.

There is also no basis for Petitioner's claim of constitutional deprivation to be found in the cases of *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), and *Time Inc. v. Firestone,* 424 U.S. 448 (1976). Assuming, without conceding, that these cases apply to an action between private individuals the constitutional requirements were fulfilled. Respondent presented competent evidence of a severely damaged reputation and also evidence of fault on the part of the defendant charged with publishing the defamatory material. *Time Inc. v. Firestone, supra,* 461.

CONCLUSION

Contrary to the assertions of Petitioner no conclusive presumption was created by the Georgia Supreme Court. In its opinion the Georgia Supreme Court merely restated the Georgia defamation law on inferred damages. Petitioner waived his right to assert constitutional challenges to the Georgia law of inferred damages because no constitutional issues were raised in the trial court. The Georgia law of inferred damages was even charged to the jury without objection by Petitioner. In any event the law of inferred damages does not violate the Petitioner's constitutional rights because Petitioner was free at any time to introduce rebuttal evidence on the question of the damaged reputation which Petitioner failed to do. Respondent proved and the jury found fault on behalf of Petitioner and competent evidence of injury to reputation was introduced. The Supreme Court of Georgia has not decided a federal question of substance not theretofore determined by this Court nor has the Georgia Court decided a federal question in a way not in accord with the applicable decisions of this Court. For all of the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Dennis T. Cathey
Attorney for Respondent

Cathey & Strain
P.O. Box 689
Cornelia, Georgia 30531

Edward E. Strain, III
Attorney for Respondent

CERTIFICATE OF SERVICE

I, DENNIS T. CATHEY, a member of the bar of the Supreme Court of the United States and counsel for the Respondent, MICHAEL L. BOW, hereby certify that I have served three copies of the foregoing Brief of Respondent in Opposition to the Petition for A Writ of Certiorari to the Supreme Court of the State of Georgia, by depositing same in the United States Mail, first class postage prepaid, to:

Michael J. Bowers
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

This_____day of November, 1978.

_____

Dennis T. Cathey
Attorney for Respondent